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10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 ROBERT RUNDO, and  
17 ROBERT BOMAN

18 Defendants.

No. CR 18-00759(A)-CJC

OPPOSITION TO DEFENDANTS' MOTION  
TO STRIKE

Hearing Date: 2/21/2024  
Hearing Time: 9:00 A.M.  
Location: Courtroom of the  
Hon. Cormac J.  
Carney

19 Plaintiff United States of America, by and through its counsel  
20 of record, the United States Attorney for the Central District of  
21 California and the undersigned Assistant United States Attorneys,  
22 hereby files its Opposition to Defendants' Motion to Strike.

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24 //

1        This Opposition is based upon the attached memorandum of points  
2 and authorities and exhibits, the files and records in this case, and  
3 such further evidence and argument as the Court may permit.

4        Dated: February 5, 2024

Respectfully submitted,

5                                E. MARTIN ESTRADA  
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                                 Chief, National Security Division

9    /s/

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In connection with the extremist group known as the Rise Above  
4 Movement ("RAM"), defendants Robert Rundo and Robert Boman and their  
5 associates traveled to various protests to commit acts of violence to  
6 forcibly oust those whose viewpoints they found objectionable.  
7 Defendants routinely bragged about their violent conduct in public  
8 and online. Defendants, along with other RAM members, also trained  
9 together, recruited together, traveled together, and conducted  
10 vicious assaults as a group. Defendants' training and recruiting to  
11 prepare for violent rioting continued in the lead-up to the August  
12 2017 incident in Charlottesville, Virginia, at which defendant  
13 Rundo's RAM co-founder, and other RAM followers, violently attacked  
14 counter-protestors.

15 The First Superseding Indictment ("FSI") and its overt acts set  
16 forth the full scope of this conspiracy. Nonetheless, defendants  
17 seek to strike many of these allegations as "prejudicial surplusage."  
18 In doing so, defendants ask this Court to disregard the rule that  
19 allegations can only be stricken from an indictment if they are not  
20 relevant to the crime charged and are inflammatory and prejudicial.  
21 The allegations defendants seek to strike go directly to establishing  
22 core elements of defendants' conspiracy charge, including the  
23 agreement to riot, the intent to riot, and the overt acts in  
24 furtherance of rioting. Defendants' request to strike should  
25 therefore be denied.

1 **II. FSI ALLEGATIONS**

2 Defendants are charged in Count One with conspiracy to riot, in  
3 violation of 18 U.S.C. § 371. The FSI sets forth allegations  
4 describing the scope of the conspiracy and defendants and their co-  
5 conspirators' systematic pattern of training to commit acts of  
6 violence, committing acts of violence, and promoting their assaults  
7 to encourage others to join them to participate in violence at future  
8 events. As a co-founder and leader of RAM, defendant Rundo  
9 coordinated and directed its members' conduct, including that of his  
10 co-conspirators. Their pattern of violence continued through four  
11 political rallies.

12 **A. March 25, 2017: Huntington Beach Rally**

13 Several weeks before the Huntington Beach rally, defendant Rundo  
14 served as the point person for organizing a hand-to-hand combat  
15 training session with other RAM members in preparation to engage in  
16 violence at the upcoming rally. (FSI ¶ 7 Overt Acts ("OA") 2-4.) On  
17 March 25, 2017, defendant Rundo, along with co-defendant Boman and  
18 several other RAM members, attended the Huntington Beach rally where  
19 they assaulted counter-protestors, including a journalist. (Id. OA  
20 6-9.) The next day, RAM members celebrated and promoted their  
21 assaults, claiming victory on behalf of the "alt-reich." (Id. OA 10-  
22 11.)

23 **B. April 15, 2017: Berkeley Rally**

24 Within mere days of the Huntington Beach rally, RAM members  
25 again took to social media and used text messages to recruit  
26 individuals to attend another rally in Berkeley, CA, where they would  
27 be prepared to commit violence in the form of hand-to-hand combat.  
28 (Id. OA 12-13.) On April 9, 2017, defendant Rundo organized a

1 training session for hand-to-hand fighting and formation fighting  
2 training for RAM members in San Clemente, CA. Then, just two days  
3 before the Berkely rally, defendant Rundo circulated a YouTube link  
4 to other RAM members on an online chat group showing large groups of  
5 individuals engaging in hand-to-hand combat in preparation for the  
6 rally. (Id. OA 14.) On the day of the rally, April 15, 2017,  
7 defendant Rundo exchanged online messages with the leader of another  
8 group to coordinate their activities at the rally. (Id. OA 17.)  
9 Defendant Rundo, along with his followers, showed up to the Berkeley  
10 rally wearing a combination of black face masks, mouth guards, and  
11 athletic tape around their wrists, and assaulted several individuals  
12 in attendance, including a Berkely police officer. (Id. OA 18-20.)  
13 On the very next day, defendant Rundo, along with other RAM members,  
14 once again took to social media and exchanged text messages to  
15 celebrate their assaults, posting photographs of their assaults and  
16 promoting their "total Aryan victory." (Id. OA 21-27.)

17 **C. June 10, 2017: San Bernardino Rally**

18 About a week before the San Bernardino Rally, defendant Rundo's  
19 co-founder of RAM, Ben Daley, sent a Facebook message to a RAM  
20 associate stating that he and several other RAM members were planning  
21 to "take over" an upcoming political march. (Id. OA 28.) On June  
22 10, 2017, defendant Rundo, along with several other RAM members,  
23 attended a political rally in San Bernardino, CA where several RAM  
24 members chased counter-protestors to their cars and smashed a car  
25 window. (Id. OA 30.) Following the event, defendant Rundo, along  
26 with his followers, yet again celebrated their assaults through text  
27 messages and social media. (Id. OA 31-33.) Defendant Rundo, for  
28 example, messaged another RAM associate on a social media platform a

1 day after the rally, offering to send the associate a video recording  
2 showing "us smashing the antifa car and chasing them" down at the  
3 rally. (Id. OA 32.)

4 **D. August 11-12, 2017: Charlottesville Rally**

5 Defendant Rundo and his followers' pattern of preparing for,  
6 engaging in, and promoting their violence continued up to and  
7 including the rally in Charlottesville, VA. The FSI alleges the  
8 following, all of which defendants request to strike:

- 9 • **June 18, 2017 (OA 34):** Two RAM members texted one another  
10 regarding booking flights to attend the Charlottesville  
11 rally.
- 12 • **July 23, 2017 (OA 35):** Defendant Rundo posted a RAM  
13 promotional video showing RAM members assaulting counter-  
14 protestors at the Huntington Beach and Berkeley rallies.
- 15 • **July 26, 2017 (OA 36):** Defendant Rundo tweeted to another  
16 user from the RAM twitter account stating, "hope we can get  
17 y'all some more commie beatdown vids soon - Antifa never  
18 learn 😊."
- 19 • **August 10, 2017 (OA 37):** Co-defendant Boman posted a  
20 photograph on his Facebook page showing himself punching a  
21 person at the Berkeley rally.
- 22 • **August 10-11, 2017 (OA 38):** Several RAM members travelled  
23 from Los Angeles, CA to Charlottesville, VA to attend the  
24 Charlottesville rally.
- 25 • **August 12, 2017 (OA 39):** Several RAM mem members attended the  
26 Charlottesville rally where they engaged in violence against  
27 individuals.

1 **III. ARGUMENT**

2 The Court should deny defendants' motion to strike the overt  
3 acts concerning the events leading up to and including the  
4 Charlottesville rally because they are relevant to establishing the  
5 core elements of defendants' conspiracy. Even assuming these  
6 allegations are not probative, defendants fail to establish that the  
7 allegations are unfairly prejudicial and inflammatory, particularly  
8 because the allegations themselves make no reference to the death of  
9 a counter-protestor at the Charlottesville rally.

10 **A. Applicable Law**

11 The purpose of a motion to strike under Federal Rule of Criminal  
12 Procedure 7(d) is to protect the defendant only from "immaterial,"  
13 "irrelevant," "prejudicial or inflammatory allegations that are  
14 neither relevant nor material to the charges." United States v.  
15 Laurienti, 611 F.3d 530, 546-47 (9th Cir. 2010) (citations omitted).

16 Thus, "a motion to strike surplusage [from the indictment]  
17 should be granted only if it is clear that the allegations are not  
18 relevant to the charge and are inflammatory and prejudicial." United  
19 States v. Rezaq, 134 F.3d 1121, 1134 (D.C. Cir. 1998) (internal  
20 quotations and citations omitted) (emphasis added); see also United  
21 States v. Daniel, 2010 WL 749873, at \*4 (C.D. Cal. 2010) (Morrow, J.)  
22 ("Motions to strike surplusage from an indictment will be granted  
23 only where the challenged allegations are not relevant to the crime  
24 charged and are inflammatory and prejudicial") (quoting United States  
25 v. Scarpa, 913 F.2d 993, 1013 (2d Cir. 1990)); United States v.  
26 Hernandez 85 F.3d 1023, 1030 (2d Cir. 1996) ("We have cautioned that  
27 motions to strike surplusage from an indictment will be granted only  
28 where the challenged allegations are not relevant to the crime

1 charged and are inflammatory and prejudicial.") (citations and  
2 quotation marks omitted).

3 The "scope of a district court's discretion to strike material  
4 from an indictment is narrow." United States v. Oakar, 111 F.3d 146,  
5 157 (D.C. Cir. 1997) (citing United States v. Jordan, 626 F.2d 928,  
6 931 n.1 (D.C. Cir. 1980)); see also Rezaq, 134 F.3d at 1134 ("Rule  
7 7(d) has been strictly construed against striking surplusage.").  
8 "The burden of showing that surplusage should be stricken as  
9 inflammatory and/or prejudicial rests with the defendant." Daniel,  
10 2010 WL 749873, at \*4.

11 **B. The Allegations are Relevant Overt Acts Taken in**  
12 **Furtherance of the Charged Conspiracy**

13 Defendants' motion to strike fails because the allegations  
14 concerning the events leading up to and including the Charlottesville  
15 event are relevant overt acts that defendant Rundo and his co-  
16 conspirators, including unindicted co-conspirators, took in  
17 furtherance of the conspiracy. To prove the charged conspiracy, the  
18 government must prove the following elements beyond a reasonable  
19 doubt: (1) an agreement between defendant and one or more other  
20 persons to violate the Anti-Riot Act ("ARA"); (2) the intent to  
21 commit the substantive crime; and (3) an overt act committed for the  
22 purpose of carrying out the conspiracy. Ninth Cir. Model Crim. Jury  
23 Instructions, § 11.1 (Conspiracy). The overt acts at issue  
24 demonstrate defendant Rundo and his co-conspirators' agreement to  
25 engage in violence at riots, their intent to carry out the agreement,  
26 and the actions they took to do so. See United States v. Terrigno,  
27 838 F.2d 371, 373 (9th Cir. 1988) (denial of motion to strike was  
28



1 proper when allegations, while somewhat prejudicial, were relevant  
2 and material to proving intent).

3 Specifically, the FSI sets forth overt acts that defendant Rundo  
4 and his co-conspirators engaged in before, during, and after the  
5 riots at which they engaged in violence. The overt acts that  
6 defendants seek to strike detail how defendant Rundo and his co-  
7 conspirators continued their conspiracy to violate the ARA after the  
8 Berkeley event and leading up to the Charlottesville event. In  
9 particular, these overt acts discuss defendant Rundo and his  
10 followers' coordination of their travel to the Charlottesville event  
11 (as they had done before); their intent to use violence at the event  
12 (as they had done before); their actual use of violence at the event  
13 (as they had done before); and their public celebration and promotion  
14 of their violence online (as they had done before). Each of these  
15 allegations is probative of defendant Rundo's participation in an  
16 ongoing agreement to violate the ARA.

17 Defendants' argument that these allegations should be stricken  
18 because defendant Rundo did not attend the Charlottesville event or  
19 reach a specific agreement to riot at that event is without merit.  
20 Initially, the FSI alleges that defendant Rundo participated in an  
21 ongoing conspiracy for several months to violate the ARA. The FSI  
22 alleges that defendant Rundo and his co-conspirators continued to  
23 prepare for violence leading up to the Charlottesville event, and  
24 that his co-conspirators and RAM followers carried out violence at  
25 that event in the name of RAM. Indeed, in addition to the overt acts  
26 set forth in the FSI, the government intends to present evidence at  
27 trial that defendant Rundo contemplated attending the Charlottesville  
28

1 event with other RAM members and then specifically directed another  
2 RAM member to document RAM members' actions at the event.

3 Moreover, although defendant Rundo did not attend the  
4 Charlottesville event alongside his RAM followers, it is well  
5 established that "a defendant need not personally commit the overt  
6 act in furtherance of the conspiracy [to be guilty of conspiracy] so  
7 long as one of the coconspirators did so." Marino v. United States,  
8 91 F.2d 691, 694-96 (9th Cir. 1937); see also United States v. Long,  
9 301 F.3d 1095, 1103 (9th Cir. 2002) (per curiam) ("[A] conspirator  
10 [is] criminally liable for the substantive offenses committed by a  
11 co-conspirator when they are reasonably foreseeable and committed in  
12 furtherance of the conspiracy." (citing Pinkerton v. United States,  
13 328 U.S. 640, 645-48 (1946))).

14 Defendants' citation to United States v. Lopez, 4 F.4th 706, 726  
15 (9th Cir. 2021) for the proposition that courts may strike  
16 allegations when they constitute one of several means to prove a  
17 particular charge is misplaced. (Dkt. 287 at 9.) Lopez did not  
18 address a conspiracy charge; it concerned a substantive crime of  
19 enticement of an individual to engage in sexual activity. Lopez, 4.  
20 F.4th at 726. In a conspiracy case, by contrast, "[t]he rule is well  
21 established that the government [. . . ] may submit proof on the full  
22 scope of the conspiracy; it is not limited in its proof to the overt  
23 acts alleged in the indictment. This is consistent with [Ninth  
24 Circuit] precedent and that of other circuits." United States v.  
25 Rizk, 660 F.3d 1125, 1131 (9th Cir. 2011); United States v.  
26 Williams, 989 F.2d 1061, 1070 (9th Cir. 1993) ("uncharged  
27 transactions" that were "closely linked to" events charged in drug  
28 conspiracy were admissible). This is especially so when the

1 allegations set forth a recurring pattern of violent conduct. See  
2 United States v. Patterson, 819 F.2d 1495, 1504-05 (9th Cir.  
3 1987) (evidence of shooting charged as overt act in drug conspiracy  
4 was not unfairly prejudicial and was relevant because shooting  
5 incident was an example of pattern of violence alleged in  
6 indictment); see also United States v. Montour, 944 F.2d 1019, 1026  
7 (2d Cir. 1991) ("If an act is relevant to the alleged conspiracy when  
8 viewed in light of all the evidence, it should not be stricken.").  
9 Because the overt acts pertaining to the events leading up to and  
10 including the Charlottesville rally are relevant to establishing the  
11 elements of the charged conspiracy, they should not be stricken from  
12 the FSI.

13 **C. The Allegations are Not Unfairly Prejudicial**

14 Defendants' motion also should be denied because he cannot meet  
15 his burden of showing that the allegations are unfairly prejudicial  
16 and inflammatory. All probative evidence is prejudicial, but only  
17 evidence that "has an undue tendency to suggest decision on an  
18 improper basis, commonly, though not necessarily, an emotional one"  
19 is considered "unfairly" prejudicial. United States v. Skillman, 922  
20 F.2d 1370, 1374 (9th Cir. 1991) (internal quotation omitted). "[T]he  
21 greater the degree of probativeness possessed by the evidence, the  
22 greater the showing of unfair prejudice that will be required to  
23 exclude the evidence." United States v. Bailleaux, 685 F.2d 1105,  
24 1111 (9th Cir. 1982). Here, with respect to the Charlottesville  
25 rally, the FSI allegations state that several RAM members prepared  
26 for and participated in the rally where they engaged in one or more  
27 acts of violence. (FSI ¶ 7 OA 34, 38-39.) The FSI does not make any  
28 mention of deaths or otherwise use inflammatory language to describe

1 any of the events associated with the rally. Nor does the government  
2 intend to present any evidence at trial related to the death of a  
3 counter-protestor during the rally. Because the allegations are  
4 narrowly tailored to the relevant acts that defendants and his co-  
5 conspirators committed, they are not unfairly prejudicial or  
6 inflammatory and defendants' motion to strike them should be denied.

7 **IV. CONCLUSION**

8 For the foregoing reasons, defendants' Motion to Strike should  
9 be denied.

10 Dated: February 5, 2024

Respectfully submitted,

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